Supreme Court, U.S.
FILED
OCT 10 1995
OFFICE OF THE CLERK

NO. 95-693

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JAMES WOODROW MULLIS,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR *WRIT OF CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

Question 1

Whether Petitioner's mere demeanor while testifying in his own behalf is sufficient substantive evidence, by itself, to establish elements of the offense to sustain the jury's guilty verdict where the government's case was admittedly insufficient to prove Petitioner's guilt beyond a reasonable doubt, thereby, nullifying appellate review of the sufficiency of the evidence as a protection against wrongful conviction.

Question 2

Whether amended Federal Rule of Criminal Procedure 29(b), which went into effect after oral argument before the Eleventh Circuit Court of Appeals but before that Court rendered its decision, should have been applied retroactively in this case in light of *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 (1987), and *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 94 S.Ct. 2006 (1974).

LIST OF PARTIES

The names of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit are:

Plaintiff-Appellee:	United States of America
Defendants-Appellants:	Floyd Brown
	James Woodrow Mullis
	Paul Wendell Calhoun, Jr.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JAMES WOODROW MULLIS, Petitioner

V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR *WRIT OF CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, James Woodrow Mullis, requests that a *writ of certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action (11th Circuit Appeal No. 93-8181) on May 15, 1995, which affirmed the judgment of conviction and sentence imposed by the United States District Court for the Southern District of Georgia (District Court No. 1:90-CR-383).

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *United States v. Brown, et al.*, 53 F.3d 312 (11th Cir. 1995). It is reproduced in Appendix A attached to this petition. The District Court orally denied Petitioner's Rule 29 motions for acquittal. Pages 785-789, 794, and 1060 of the transcript, containing Petitioner's motions and the court's oral denial of said motions, are reproduced in Appendix B attached to this petition. The Court of Appeals' order denying petitions for rehearing, filed by Petitioner's co-defendants, is reproduced in Appendix C attached to this petition.

JURISDICTIONAL STATEMENT

The Eleventh Circuit Court of Appeals entered its judgment and opinion in this case on May 15, 1995, and denied petitions for rehearing, filed by co-defendants Brown and Calhoun, on July 11, 1995. Petitioner Mullis did not seek rehearing, but timely files this petition pursuant to this Court's Rules 13.1 and 13.4.

Petitioner Mullis invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). The notifications required by this Court's Rule 29.4(b) and (c) are not applicable in this case.

STATUTES AND RULES INVOLVED

Federal Rule of Criminal Procedure 29(b), effective December 1, 1994, reads as follows:

> "The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved."

STATEMENT OF THE CASE

A grand jury in the Southern District of Georgia, Statesboro Division, indicted Petitioner Mullis along with Floyd Brown, Paul Wendell Calhoun, Jr., Gene Collins and twenty other defendants, in a nineteen count drug-related indictment. The grand jury named Petitioner Mullis in three counts of the indictment, charging him with conspiracy to distribute marijuana and cocaine in violation of 21 U.S.C. §§ 841, 846 in Count One, with money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) in Count Three, and carrying a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c) in Count Four. Pursuant to 18 U.S.C. § 3231, trial commenced in the United States District Court for the Southern District of Georgia on November 9, 1992.

At the close of the government's case-in-chief, Petitioner Mullis moved for a judgment of acquittal on the money laundering and firearms counts pursuant to Fed. R. Crim. Pro. 29. R17-785-789 (Appendix B, p. 2-3) The district court, "ha[d] some concerns" about the motions, but "provisionally" denied them, R17-794 (Appendix B, p. 3), whereupon, Petitioner Mullis chose to testify in his own behalf. The district court denied Petitioner's renewed motion for acquittal after the close of all the evidence. R17-1060 (Appendix B, p. 3).

On November 18, 1992, the trial jury found Petitioner Mullis not guilty on the Count Four firearm charge, and guilty on the Count One conspiracy and Count Three money laundering charges. R19-1121. Pursuant to 28 U.S.C. §§ 1291, 1294, Petitioner Mullis appealed his conspiracy and money laundering convictions to the United States Court of Appeals for the Eleventh Circuit, a three judge panel of which heard oral argument on November 15, 1994.[1] The circuit court panel affirmed the district court on May 15, 1995, with one judge concurring and dissenting. *United States v. Brown*, 53 F.3d 312 (11th Cir. 1995). The circuit court panel majority held that "the defendant's testimony, denying guilt, may establish, by itself, elements of the offense" to support the guilty verdict returned by the jury. *United States v. Brown*, 53 F.3d at 315 (Appendix A, p. 3). The dissent noted that "[t]he majority . . . squarely holds . . . that the evidence supporting the conviction of a defendant who takes the stand and testifies in his own behalf is unreviewable," *United States v. Brown*, 53 F.3d at 315 (Moye, J. dissenting) (Appendix A, p. 4-5), and effectively absolves the appellate court "of the duty of determining whether all the evidence of record was sufficient to support his conviction." *United States v. Brown*, 53 F.3d at 315 (Moye, J. dissenting) (Appendix A, p. 4). The majority

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[1] Honorable Charles A. Moye, Jr., Senior United States District Judge for the Northern District of Georgia, sitting by designation.

below also held that amended Federal Rule of Criminal Procedure 29(b) "applies to no cases tried to verdict before the effective date (1 December 1994) of the amendment," *United States v. Brown*, 53 F.3d at 314 n. 3 (Appendix A, p. 2), while the dissent would have applied the amended rule to reverse Petitioner Mullis' money laundering conviction. *United States v. Brown*, 53 F.3d at 318 (Moye, J., dissenting) (Appendix A, p. 8-9). Petitioner Mullis did not file a petition for rehearing, but his co-defendants, Brown and Calhoun, did file such petitions, which the circuit court denied on July 11, 1995. Appendix C.

REASONS FOR ALLOWANCE OF THE WRIT

I. THIS PETITION FOR A *WRIT OF CERTIORARI* SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

The United States Court of Appeals for the Eleventh Circuit, in its 2-1 panel decision below, held that where a criminal defendant chooses to testify, unreviewable demeanor evidence is sufficient substantive evidence of the defendant's guilt to remedy a deficiency in the government's proof in the evidence of record to prove guilt beyond a reasonable doubt. *United States v. Brown*, 53 F.3d 312 (11th Cir. 1995).

> "At least where some corroborative evidence of guilt exists for the charged offense . . . and the defendant takes the stand in his own defense, the defendant's testimony, denying guilt, may establish, **by itself**, elements of the offense." *United States v. Brown*, 53 F.3d at 314-315 (emphasis added) (Appendix A, p. 3).

Thus, while the appellate panel could not say the government's evidence was enough to prove guilt beyond a reasonable doubt, it avoided that issue by holding that demeanor evidence could establish, by itself, elements of the offense. This decision by the Eleventh Circuit directly conflicts with the District of Columbia Circuit's decision in *United States v. Zeigler*, 994 F.2d 845 (D.C. Cir 1993), and with the Second Circuit's decision in *United States v. Sliker*, 751 F.2d 477 (2d Cir. 1984).

This Court has not squarely addressed the issue of whether demeanor evidence is, by itself, sufficient substantive evidence to support a guilty verdict beyond a reasonable doubt.[2] A century ago, in *Wilson v. United States*,

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[2] This Court did hold in a denationalization case that negative inferences cannot fill the gap in the Government's case. *Mitsugi Nishikawa v. Dulles*, 356 U.S. 129, 137, 78 S. Ct. 612, 617 (1958).

162 U.S. 613, 16 S.Ct. 895 (1896), this Court did state that,

> "if the jury were satisfied, ***from the evidence***, that false statements in the case were made by defendant . . . they had the right, not only to take such statements into consideration, ***in connection with all the other circumstances of the case***, in determining [the defendant's guilt or innocence], but also to regard false statements . . . as in themselves ***tending*** to show guilt." *Wilson v. United States*, 162 U.S. at 620-621, 16 S.Ct. at 898-899 (emphasis added).

In *Wilson* the jury inferred guilt from extensive evidence of Wilson's guilt presented by the government in its case (i.e., Wilson's possession of murder victim's six horses, wagon, gun, bloody bedclothing, and other property when he was arrested; Wilson's ax with blood on it while the victim's head was crushed with a blunt instrument, etc.), and not upon Wilson's 'demeanor' while testifying, even though Wilson's explanations "were inadequate and improbable, and evidence in much detail showed that many of his [Wilson's] statements were false." *Wilson v. United States*, 162 U.S. at 615, 16 S.Ct. at 896. Clearly, the *Wilson* jury determined the defendant's statements to be false based upon contradictory evidence tending to show guilt, not upon the defendant's demeanor, and the defendant's guilt was not based solely upon the false statements. Meaningful appellate review of the jury verdict in *Wilson* was possible **from the reviewable record evidence without reliance upon unreviewable demeanor evidence.**

More recently, a plurality of this Court, in finding the evidence sufficient to support conviction regardless of the standard for federal review on habeas corpus of a state-court determination, did state that "if the jury did disbelieve [defendant], it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt." *Wright v. West*, 505 U.S. ___, ___, 112 S.Ct. 2482, 2492 (1992). However, in the margin of the opinion,[3] the plurality extensively quoted defendant's testimony of record, and determined from the **reviewable recorded testimony** that the defendant "contradicted himself repeatedly . . . gave vague, seemingly evasive answers . . . [and] failed to produce any other supporting evidence." *Wright v. West*, 505 U.S. at ___, 112 S.Ct. at 2492. Thus, this Court determined the evidence was sufficient to support conviction, based on the **reviewable evidence in the record and not on unreviewable demeanor evidence.**[4]

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[3] *Wright v. West*, 505 U.S. at ___ n. 1, 112 S. Ct. at 2484 n. 1.

[4] The plurality and concurring opinions in Wright v. West, 505 U.S. ____, 112 S. Ct. 2482 (1992), reveal the court unanimously determined the evidence was sufficient to support the conviction.

In *Zeigler*, the District of Columbia Circuit distinguished *West*, finding that it faced a different issue, i.e., "not the [the issue of the] jury's prerogative, but the function of an appellate court reviewing the sufficiency of evidence to support a conviction." *United States v. Zeigler*, 994 F.2d at 849 n. 3. Even if the issues were the same in the two cases, the result in *Zeigler* conforms to this Court's judgment in *West*, given that the reviewable record in *West*, as opposed to unreviewable demeanor evidence, showed that the defendant in *West* "contradicted himself repeatedly . . . gave vague, seemingly evasive answers . . . [and] failed to produce any other supporting evidence." *Wright v. West*, 505 U.S. at ___, 112 S.Ct. at 2492. This would seem to be the situation alluded to by the District of Columbia Circuit Court when it opined that "[t]he situation would be different if the defendant's testimony, on its face, were utterly inconsistent, incoherent, contradictory or implausible." *United States v. Zeigler*, 994 F.2d at 849.

Holding that negative inferences may supply enough evidence to convince any rational trier of fact of a defendant's guilt beyond a reasonable doubt raises obvious problems. The District of Columbia Circuit Court's analysis of such a rule warrants extensive quotation.

> "It is not only impossible to determine whether the jury made all or any of these negative inferences, but also impossible to judge whether it would have been justified in doing so. . . . Demeanor evidence is not captured by the transcript; when the witness steps down, it is gone forever. An appellate court cannot evaluate it, and therefore cannot determine how a rational juror might have treated it. . . . Because we cannot evaluate demeanor, a decision along the lines the government proposes would mean that in cases in which defendants testify, the evidence invariably would be sufficient to sustain the conviction. We would in each such case assume the jury correctly evaluated the evidence. In explaining how this could be so in light of the defects in the government's proof, we would reason backwards to the only explanation available--the defendant's demeanor. This sort of approach, beginning with the hypothesis that the jury must have gotten things right, contradicts the reason why appellate courts review convictions for sufficiency of evidence--that juries sometimes get things wrong." *United States v. Zeigler*, 994 F.2d at 849.

Further quotation from *Zeigler* reveals the ultimate result of such a rule:

> "There is no principled way of deciding when the government's proof, less than enough to sustain the conviction, is nevertheless enough to allow adding negative inferences from the defendant's testimony to

fill the gaps. . . . Appellate review of the sufficiency of evidence protects against wrongful convictions. We refuse to destroy the protection in cases in which defendants testify." *United States v. Zeigler*, 994 F.2d at 850.

The Second Circuit put it succinctly when it said that "[A]lthough [demeanor evidence] is a legitimate factor for the jury to consider, this could not remedy a deficiency in the Government's proof if one existed." *United States v. Sliker*, 751 F.2d at 495 n. 11.

The Seventh Circuit apparently took a position similar to the Eleventh Circuit by holding that the defendant's "demeanor and the expert testimony" entitled a jury to convict beyond a reasonable doubt. *United States v. Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991).[5] Thus, four circuit courts of appeals have created a 2-2 circuit split. The Seventh and Eleventh Circuit Courts of Appeals hold unreviewable demeanor evidence sufficient to support a guilty verdict in the face of insufficient record evidence. Contrariwise, the District of Columbia Circuit and the Second Circuit hold that such unreviewable demeanor evidence may not fill such a gap in the government's proof.[6] Inasmuch as "[s]uch cases are unlikely to occur," *United States v. Zafiro*, 945 F.2d at 888, the remaining circuit courts of appeals have apparently not yet had occasion to consider or decide the issue, and may not do so anytime soon. However, "rare as the *Zafiro* court thought they may be, [such appeals] do occur," *United States v. Zeigler*, 994 F.2d at 850, and this circuit split needs to be resolved. Therefore, this Court should now take the opportunity to squarely address the issue of whether a criminal defendant's mere demeanor while testifying in his own behalf is sufficient substantive evidence, by itself, to sustain a jury's guilty verdict in the face of a deficiency in the government's proof to prove guilt beyond a reasonable doubt. Resolution of this important question is important because of the implications for the fair administration of criminal justice.

II. THIS PETITION FOR A *WRIT OF CERTIORARI* SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT COURT OF APPEALS DECIDED A QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF

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[5] The Seventh Circuit Court of Appeals may not be squarely on all fours with the Eleventh Circuit in that *Zafiro* required "expert testimony" in addition to the demeanor evidence.

[6] See also, *United States v. Eisen*, 974 F. 2d 246, 259 (2nd cir. 1992), where the Second Circuit Court of Appeals addressed negative inferences drawn from witnesses other than the defendant ("without affirmative evidence in corroboration, such a negative inference is, by itself, insufficient to support the conviction").

THIS COURT, i.e., THE CIRCUIT COURT REFUSED TO RETROACTIVELY APPLY NEW FEDERAL RULE OF CRIMINAL PROCEDURE 29(b) CONTRARY TO THIS COURT'S ORDER IMPLEMENTING THE AMENDED FEDERAL RULES OF CRIMINAL PROCEDURE AND CONTRARY TO APPLICABLE CASE LAW.

The United States Court of Appeals for the Eleventh Circuit, in its 2-1 panel decision below, also held that amended Federal Rule of Criminal Procedure 29(b), which became effective December 1, 1994, did not apply in Petitioner's case even though the appeals court rendered its decision May 15, 1995.

> "At the outset, we hold that the amended Rule applies to no cases tried to verdict before the effective date (1 December 1994) of the amendment. A retroactive application on appeal of a rule designed to control proceedings in criminal trials seems neither just nor practical to us. Justice and practicality are the standards." *United States v. Brown*, 53 F.3d at 314 n. 3 (Appendix A p. 2).

Although the circuit court cited the proper standards--justice and practicality--it erred by using the verdict at trial as the point at which to determine application rather than the pending finality of the case following appeal.

> "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a `clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716 (1987).

> "[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016 (1974).

Amended Federal Rule of Criminal Procedure 29 "shall take effect on December 1, 1994, and shall govern all proceedings in criminal cases thereafter commenced and, ***insofar as just and practicable, all proceedings in criminal cases then pending***." Supreme Court Order, Amendments to Federal Rules of Criminal Procedure, April 29, 1994, ¶. 2 (emphasis added).

The *Griffith* and *Bradley* rules, as well as this Court's order implementing the amended Federal Rules of Criminal Procedure, require application of amended Federal Rule of Criminal Procedure 29(b) to Petitioner Mullis'

case, even though the amended rule was not in effect at the time Petitioner's appeal was orally argued before the circuit court (November 15, 1994), because the amended rule was in effect at the time the circuit court rendered its decision making Petitioner's case final (May 15, 1995). The dissent below recognized the significance of the circuit court majority's failure to apply amended Rule 29(b) in Petitioner's case.

> "[M]anifest justice requires that amended Rule 29 be applied at the appellate stage in this pending criminal appeal. If that were done, then, under the majority's own analysis, Mullis's conviction would have to be reversed." *United States v. Brown*, 53 F.3d at 319 (Moye, J., dissenting) (Appendix A p. 9).

At the time of Petitioner's trial the rule in the Eleventh Circuit prohibited the district court from reserving ruling on Petitioner's motion for judgment of acquittal made at the close of the government's case-in-chief.[7] However, amended Rule 29(b) would seem to alter this circuit rule by permitting district courts to reserve ruling, in which case the district court must later make its decision "on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b). This provision addresses the situation where a district court reserves ruling and the defendant presents evidence which actually supports the government's case. "[I]n reviewing a trial court's ruling,the appellate court would be similarly limited." Notes of the Advisory Committee on Rules, 1994 Amendment, Fed. R. Crim. P. 29(b). Thus, amended Rule 29(b) would apply to Petitioner's case to require reversal of his money laundering conviction.

Furthermore, certain principles governing this Court's decision in *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141 (1978), a double jeopardy case hinging upon evidentiary insufficiency, seem to conflict with the majority opinion below.

> "[I]t should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient. The appellate decision unmistakably meant that the District Court had erred in failing to grant a judgment of acquittal. To hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court." *Burks v. United States*, 437 U.S. at 11, 98 S.Ct. at 2147 (italics in original; internal citations omitted).

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[7] The district court apparently attempted to reserve ruling on Petitioner Mullis' Rule 29 motion for judgment of acquittal while satisfying the 11th Circuit prohibiton against such reservation by "provisionally" denying the motion. R 17-794 (Appendix B, p. 3)

As the dissent below recognized,

> "to apply one rule to a defendant where the court has reserved ruling and another to a defendant where the court has erroneously overruled a Rule 29 motion is incongruous. The basic problem being the same, justice requires a like solution." *United States v. Brown*, 53 F.3d at 319 (Moye, J., dissenting) (Appendix A p. 9).

In any event, the standard is to apply the amended rule **unless** so doing results in manifest injustice--not apply the rule **only if** justice and practicality necessitate its application. Application of the amended rule to Petitioner Mullis' case does not result in an injustice and is not impractical, even if failure to apply it might be considered by some to be just or practical. Therefore, this Court should take the opportunity to specifically address the application of amended Federal Rule of Criminal Procedure 29(b) to cases tried before its effective date but pending on appeal.

III. CONCLUSION

This Petition for a *Writ of Certiorari* should be granted so that this Court can decide an important question of federal law which has not been, but should be, settled by this Court, i.e., whether Petitioner's mere demeanor while testifying in his own behalf, demeanor which is not part of the record on appeal, is invariably sufficient substantive evidence, by itself, to sustain the jury's guilty verdict in the face of a deficiency in the government's proof to prove Petitioner's guilt beyond a reasonable doubt, and to enable this Court to decide whether the circuit court erred in failing to apply amended Federal Rule of Criminal Procedure 29(b) in Petitioner's case, which was decided by the circuit court on May 15, 1995, after the December 1, 1994, effective date of the amended rule, but which was tried in the district court from November 9-18, 1992, and argued before the circuit court on November 15, 1994, before the effective date of the amended rule?

Respectfully submitted,

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APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

Floyd BROWN, James Woodrow Mullis, Paul Wendell Calhoun, Jr., Defendants-Appellants.

No. 93-8181.

United States Court of Appeals, Eleventh Circuit.

May 15, 1995. | 313

Appeals from the United States District Court for the Southern District of Georgia.

Before EDMONDSON and CARNES, Circuit Judges, and MOYE*, Senior District Judge.

EDMONDSON, Circuit Judge:

James Mullis appeals his conviction for money laundering on the ground of insufficient evidence. [1] We affirm the conviction.

To show that Mullis laundered money, the government must prove that Mullis took part in a financial transaction with money he knew was obtained illegally and with the intent to promote the illegal activity or with intent to disguise the source of the money. See 18 U.S.C. 1956. In reviewing a claim of insufficiency of the evidence, we view all evidence in the light most favorable to the government. *United States V. Poole, 878* F.2d 1389, 1391 (11th Cir. 1989) (per curiam).

Testimony by Gene Collins showed that Mullis was a part of a drug organization headed by Gene Collins that bought and sold marijuana from Texas to Georgia.[2] From December 1990 to March 1991, many calls were made from Mullis' telephone to Texas. Mullis also drove Collins to Texas

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[1] Mullis was also convicted of conspiracy to distribute marijuana and cocaine. *See* 19 U.S.C. 2 and 21 U.S.C. 841, 846. Mullis appeals both his money laundering and conspiracy convictions by charging prosecutorial misconduct and error by the district court in sending only government tape transcripts to the jury. We affirm on these issues without discussion.Floyd Brown appeals his convictions for conspiracy to possess with intent to distribute marijuana and cocaine and for money laundering. Brown's appeal raises questions about prosecutorial misconduct, the district court's sending tape transcripts to the jury, sufficiency of evidence and the indictment for money laundering.

Paul Wendell Calhoun also appeals his conviction for money laundering based on insufficiency of the evidence and on the ground that the indictment improperly charged the offense. We conclude that Brown and Calhoun have shown no reversible error and affirm the convictions. *See* 11th Cir.R. 36-1.

[2] Collins was indicted with the other members of the organization, but pled guilty and testified at trial for the Government.

two or three times on drug business. Although Mullis transported no marijuana on those trips to Texas, he at another time did pick up a six-pound shipment of marijuana and take it to the 292 Club, a club owned by Collins through Collins' ownership of the Phoenix Timber Company.

Other testimony at trial showed more directly Mullis' participation in a scheme to launder the proceeds of the drug business. When Collins was buying the 292 Club, Dan McSwain, the club's owner, told Collins that McSwain could not take the entire $5000 down payment in cash. Collins testified that, in a conversation with Paul Calhoun (Collins' then lawyer) and with Mullis and Brown about the purchase of the 292 Club, Collins instructed Mullis and Brown each to go to different banks and to get a cashier's check for $2000. Collins also testified that Paul Calhoun told Mullis to show Calhoun-that is, not Collins-as the remitter of the check.[314]

The government's evidence was possibly enough to prove guilt beyond a reasonable doubt. The evidence was enough to prove that Mullis knew that Collins' money came from the marijuana business. And the fact, among other things, that Mullis showed Calhoun as the remitter of the check might properly allow a jury to infer that Mullis knew the purchase of the 292 Club was intended to hide Collins' drug proceeds. See generally *United States v. Macko*, 994 F.2d 1526, 1533 (11th Cir. 1993) ("Circumstantial evidence may prove knowledge and intent") But we have no need to decide finally whether the government's evidence alone was enough to prove guilt.

In addition to the other evidence of guilt, Mullis elected to take the stand to testify in his defense. Defendants in criminal trials are not obliged to testify. And, a defendant who chooses to present a defense runs a substantial risk of bolstering the Government's case. [3] *United States v. Bennett*, 848 F.2d 1134, 1139 (11th Cir. 1988). "[A] defendant whose motion for acquittal at the close of the Government's case is denied must decide whether to stand on his motion or put on his defense, with the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilt." *McGautha v. Califonia*, 402 U.S. 183, 214, 91 S.Ct. 1454, 1471, 28 L.Ed.2d 711 (1971),

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[3] Our colleague in dissent has made much of the 1994 Amendment to Federal Rule of Criminal Procedure 29. At the outset, we hold that the amended Rule applies to no cases tried to verdict before the effective date (1 December 1994) of the amendment. A retroactive application on appeal of a rule designed to control proceedings in criminal trials seems neither just nor practical to us. Justice and practicality are the standards. See Order of Chief Justice Rehnquist date 29 April 1994. This case was fully tried before 1 December 1994. And, by the way, no party in this case has cited the Amendment to the Rule to us.

The law applicable to this case is established by precedent binding on this panel. A defendant who presents evidence waives the right to appeal the denial of his rule 29 motion made and denied at the end of the government's case. Instead, the law of this Circuit is that an insufficiency of the evidence claim like this one will be reviewed taking into account all evidence presented in the case, including evidence put on by the defendant. *United States V. Thomas*, 8 F.3d 1552, 1558 n. 12 (11th Cir.1993).

reh'g denied by McGautha v. California, 406 U.S. 978, 92 S.Ct. 2407, 32 L.Ed.2d 677 (1972), and *vacated in part on other grounds sub nom. Crampton v. Ohio*, 408 U.S. 941, 92 S.Ct. 2873, 33 L.Ed.2d 765 (1972).

Most important, a statement by a defendant, if disbelieved by the jury, may be considered as *substantive evidence* of the defendant's guilt[4] *See, e.g., United States v. Allison*, 908 F.2d 1531, 1535 (11th Cir. 1990);*United States v. Howard*, 895 F.2d, 722, 724-725 (11th Cir. 1990); *United States v. Bennett*, 848 F. 2d 1134, 1139 (11th Cir. 1988); *United States v. Eley*, 723 F.2d 1522, 1525 (11th Cir. 1984). By "substantive evidence" we mean evidence "adduced for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness (i.e., showing that he is unworthy of belief), or of corroborating his testimony." *See Black's Law Dictionary* 1429 (6th ed. 1990). To be more specific, we have said that, when a defendant chooses to testify, he runs the risk that if disbelieved "the jury might conclude the opposite of his testimony is true." *Atkins v. Singletary*, 965 F.2d 952, 961 n. 7 (11th Cir. 1992); *accord United States v. Sharif*, 893 F.2d 1212, 1214 (11th Cir. 1990). Mullis testified under oath that he did not know that Gene Collins was in the drug business. He also testified that he was in no way involved in helping Collins buy the 292 Club. But, the jury, hearing Mullis' words and seeing his *demeanor*, was entitled to disbelieve Mullis' testimony and, in fact, to believe the opposite of what Mullis said.

At least where some corroborative evidence of guilt exists for the charged offense (as is true in this case where, for example, there was evidence that Mullis helped convert cash to a cashier's check to advance the purchase of the 292 Club) and the defendant takes the stand in his own defense, the defendant's testimony, denying guilt, may establish, by itself elements of the offense. This rule applies with special force where the elements to be proved for a conviction include highly subjective elements: for example, the defendant's intent or knowledge, such as knowing the purchase of the 292 Club was intended to hide Collins' drug proceeds. *See United States v. Morales*, 868 F.2d 1562, 1574 (11th Cir. 1989); *United States v. Eley*, 723 F.2d at 1525. Experience tells us that, where the issues in litigation involve highly subjective matters, the appearance and demeanor of the witnesses is of particular significance. *See, e.g., General Ins. Co. v. Thielepape*, 400 F.2d 852 (5th Cir. 1968).

Because the evidence was sufficient, Mullis' conviction for money laundering is affirmed.

AFFIRMED.

---

[4] As we understand the core of the dissent, our colleague, in effect, rejects the idea that disbelieved testimony of a criminal defendant is substantive evidence to be counted toward guilt. But a significant body of precedent in this circuit recognizes that disbelieved testimony is substantive evidence to prove guilt; and this panel must faithfully credit those precedents. *See Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

MOYE, Senior District Judge, concurring and dissenting:

I.

I concur in the affirmance of the convictions of the defendants Brown and Calhoun, and of Mullis's drug conviction; I most respectfully dissent from the affirmance of the conviction of defendant Mullis on the money-laundering count. I would reserve that conviction for the reason that, considering all the evidence in the aspect most favorable to the government, there was insufficient evidence upon which a reasonable jury could have found defendant Mullis guilt beyond a reasonable doubt.

This case concerns a drug money-laundering conspiracy. The "King Pin", Gene Collins, became a government witness pursuant to a plea agreement and testified against his underlings, the three appellants here, including Mullis, his driver and bodyguard. After analyzing all the government's evidence against Mullis on the money-laundering count, the majority was able to conclude only that the government's evidence was *possibly* enough to prove guilt beyond a reasonable doubt.

> The government's evidence was *possibly* enough to prove guilt beyond a reasonable doubt. The evidence was enough to prove that Mullis knew that Collins' money came from the marijuana business and the fact, among other things, that Mullis showed Calhoun as the remitter of the check might properly allow a jury to infer that Mullis knew the purchase of the 292 Club was intended to hide Collins' drug proceeds. (Emphasis added).

Recognizing that under their analysis of the government's evidence, Mullis's conviction must be reversed, the majority adds:

> But we have no need to decide finally whether the government's evidence alone was enough to prove guilt.

The majority does not consider what if any evidentiary contribution the defendant's testimony (or defendant's other evidence) makes toward allowing a reasonable jury to find Mullis guilty beyond a reasonable doubt, but holds that the mere fact that Mullis testified in person absolves this court of the duty of determining whether all the evidence of record was sufficient to support his conviction. It is only on this, I believe fundamental, point that I differ from the majority and feel myself compelled to dissent.

In support of its position with respect to the effect of a defendant's own testimony, the majority relies on several legal or procedural propositions, completely sound of themselves, but not altering the duty of this appellate court to insure that all criminal defendants receive due process of law which requires among other things a unanimous verdict of guilty (present here) based upon evidence upon which a jury reasonably could have found guilt beyond a reasonable doubt. The majority of a panel of a Court of Ap-

peals today squarely holds, for the first time, that the evidence supporting the conviction of a defendant who takes the stand and testifies in his own behalf is unreviewable.

The majority says, that "Defendants in criminal trials are not obliged to testify. And a defendant who chooses to present a defense runs a substantial risk . . . that he will bolster the Government case enough for it to support a verdict of guilty."[316]

It is undisputed that, in federal court, a defendant's sworn testimony must be treated just as the testimony of any other witness, and his testimony which itself is evidence may supply the very factual element or elements necessary to his conviction.

But while a criminal defendant runs the risks associated with all federal trials (no longer laboring under the disability formerly associated with state procedures) he should not be penalized in a way different from other litigants in federal courts by forfeiting thereby the basis for rational appellate review of the evidence.

Also it is undisputed that the jury may choose to believe the defendant, in whole or in part, or to disbelieve him entirely. All questions of credibility are for the jury. Proof of their disbelief is found in a jury's verdict of guilty; and it is only where there has been a guilty verdict (where the jury has disbelieved a testifying defendant) that an appellate court must determine the sufficiency of the evidence. The sufficiency of the evidence has always heretofore been determined upon the record itself, the transcript of testimony and the exhibits, which the appellate court could analyze and on the basis of a record before it determine whether the guilty verdict (the record evidence of the jury' s disbelief of defendant's case) was supported by the evidence. Since what is in the jury's mind is unknowable, other than it must have disbelieved the defendant since it entered a verdict of guilty, to put its disbelief (the verdict itself) into the scale to be weighed by the appellate Court necessarily precludes in a sort of "boot strap" way appellate review as to the sufficiency of the evidence where a defendant has testified.

The "substantive evidence" proposition referred to by the majority apparently derives most recently from Judge Hill's opinion in *United States v. Eley*, 723 F.2d 1522, 1524-26 (11th Cir. 1984) which involved the inference/presumption from recent possession of stolen property . The *Eley* court held that:

> Unlike the defendant's explanation in *Cosby v. Jones*, [682 F.2d 1373 (11th Cir. 1982),] Eley's explanation is so implausible that it gives rise to positive evidence in favor of the government. Accordingly, we hold that appellant's possession of goods recently stolen, together with the corroborating evidence arising from his wholly incredible story, are sufficient proof of theft and transportation to support the jury guilty verdicts

on both counts of the indictment.

Eley, at 1525. Thus, *Eley* must be read in connection with its understanding of *Cosby v. Jones*, supra:

> In *Cosby*, the court held that the bare fact of possession and the pawning of stolen goods, absent some type of corroborating evidence or circumstances, does not give rise to an inference sufficient to support a defendant's conviction for burglary. The court observed that the defendant's explanations of his possession of the stolen goods was not seriously contradicted by any evidence of the government. *Id*, at 1382. The court further noted that the inference of stolen goods "is at its strongest when the defendant wholly fails to make a credible explanation or makes a demonstrably false explanation." *Id*, at 1382-83. Cosby's explanation of possession was found not so implausible or demonstrably false to give rise to positive evidence in favor of the prosecution. *Id*. at 1383 n. 19.

Eley, 723 F.2d at 1524. The Court in *Cosby* had observed:

> The state also points to the inconsistencies in Cosby's explanation of possession. See note 17 *supra*. His testimony was no so implausible or demonstrably false as to give rise to positive evidence in favor of the government. *Accord*, *Holloway v. McElroy, supra*, 632 F.2d [605,] at 641 [(5th Cir.1980)] (inconsistencies in defendant's story do not support government's case but only discredit the specific points in defendant's testimony). *Compare U.S. v Contreras*, 667 F.2d 976, 980 (11th Cir. 1982) ("wholly incredible" evidence bolsters government's case).

Cosby, 682 F.2d at 1383 n. 19 (emphasis added).[317]

It should be noted further that *Eley* went only so far as to hold that the implausible evidence could be considered as "corroborating" evidence, sufficient to enable a jury reasonably to draw the inference of knowledge from recent possession, not the basic evidence in chief supplied by the proof of recent possession. The majority here reverses that order, and says that where a defendant has testified, regardless of the substance of his testimony, all that is required is corroborative evidence of guilt.

Subsequent Eleventh Circuit cases involving the effect of statements, testimonial or out-of-court, by defendants, have adhered to the *Cosby/Eley* analysis: the usual rules governing testimony by all witnesses are followed with the exception that an aberrational statement (in or out of Court) by its implausibility or falseness, demonstrable to the appellate court from the record itself, may provide corroboration for an inference arising from behavior requiring explanation.

United States v. Allison, 908 F.2d 1531, 1535 (11th Cir.1990), cited

by the majority, was decided on the right of the jury to make a credibility determination:

> The jury in this case had the opportunity to consider not only the evidence presented in the prosecution's case, but the testimony of defendants themselves. This is important. "Presented with two narratives, one tending to establish the defendant's guilt and another tending to establish innocence, the jury was entitled to choose the account offered by the government."

Id. at 1535 (citation omitted). That is clearly a correct statement, with which there is no disagreement, indicating that the *Allison* court had found the Government's evidence sufficient for a reasonable jury to find guilt beyond a reasonable doubt.

In *U.S. v. Howard*, 895 F.2d 722, 724 (1990) relied upon by the majority here as well as by the *Allison* Court, the clear finding on the sufficiency of the evidence was:

> "We believe this evidence was sufficient to allow a jury to conclude, beyond a reasonable doubt, that Howard and James knew the essential nature of the conspiracy, that is to distribute marijuana."

In *U.S. v. Bennett*, 848 F.2d 1134, 1139 (11th Cir.1988), relied upon the majority as well as by the *Allison* Court, the court found:

> "We conclude that there was ample evidence from which a reasonable jury might find both William and Michael Bennett guilty beyond a reasonable doubt."

The Court noted the fact that the Bennetts's in-trial explanation of their activities was "dubious, if not wholly incredible." The court stated that "a reasonable jury might well disbelieve the explanation and conclude that the Bennetts were lying in an attempt to cover up illegal activities." Even if that statement, coupled with the reference to *Eley*, meant that the *Bennett* court assigned some evidentiary weight to the fact defendants made an implausible explanation of their activities, it nevertheless proceeded to determine the sufficiency of all the evidence to support a conviction.

But, in this case the majority already has determined that the government's evidence was sufficient to establish only a "possibility" of guilt. There is no suggestion the defendant's testimony was either demonstrably false, dubious or implausible. The majority summarize Mullis's testimony (pp. 314-315).

> Mullis testified under oath that he did not know that Gene Collins was in the drug business. He also testified that he was in no way involved in helping Collins buy the 292 Club. But, the jury, hearing Mullis, words and seeing his *demeanor*, was entitled to disbelieve Mullis' testimony and, in fact, to believe the opposite of what Mullis said.

(Majority Opinion, p. 314) Of course, the jury could disbelieve Mullis, but to "believe the opposite" the jury would have also to "believe the opposite" of the testimony of the government's own witness.The testimony of the government's chief witness in substance was identical to that of defendant on the critical issue of knowledge. Mr. Collins on tape said to a government informant:

> "Now, here's my opinion, now here's my opinion . . . . Cause Jim (Mullis) don't know nothing about what's going on. Now, Jim's a damn good boy, and . . . would die for me in a heartbeat. But Jim's a logger and a pulpweeder, and he don't have (deleted). And he ain't got nothing in my business. But he ain't got nothing in my business. Nothing whatsoever."

See Exhibit R-13-362-364; R379-80 The Circuit's evidentiary rules as to implausible, dubious or demonstrably false explanations are inapplicable here. Demeanor is a factor which the jury may take into account in assessing credibility — it is not evidence itself. The jury was entitled to believe the "opposite" of what Mullis said, but only if there was some evidentiary basis for whatever that "opposite" was. Nor has the majority attempted to determine, as required by *Cosby, supra*, the degree of inconsistency, falseness or dubiety necessary for such testimony to be considered under the implausible testimony doctrine. Since the government's evidence, as found by the majority, is insufficient to establish guilt beyond a resonable doubt even after giving it the benefit of all reasonable inferences, I would reverse Mullis's money-laundering conviction.

II.

It has long been the rule in the Eleventh Circuit, inherited from the Fifth, that by presenting evidence a defendant waives the right to appeal the denial of his Rule 29 motion made at the end of the government's case. The purpose of the rule is quite understandable. It is undesirable to let go free a defendant whom the whole evidence shows to be guilty even though the government may not have done a good job in making out its case-in-chief. But, giving the rule its full effect, I respectfully believe it results in manifest injustice to go so far as the majority does in this case, that is, to combine it with a newly announced rule that the mere fact of a defendant's testifying in person will preclude appellate review on the sufficiency of the evidence. Here there has been no additional evidence provided by the defendant to shore up the government's case, to carry it from "possibly" to "beyond a reasonable doubt."

Fed.R.Crim.P. 29(b) as amended effective December 1, 1994, should be held applicable to this proceeding.[1] That rule as now amended provides:

---

[1] See order of Chief Justice Rehnquist dated April 29, 1994. *See also Bradley v. School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1973); *F.D.I.C. v. 232, Inc.*, 920 F.2d 815 (11th Cir.1991).

> The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. *If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.*

Fed.R.Crim.P. 29(b) (emphasis added). The Notes of the Advisory Committee on the Federal Rules of Criminal Procedure explain the rationale of the amendment:

> Reserving a ruling on a motion [for judgment of acquittal] made at the end of the government's case does pose problems, however, where the defense decides to present evidence and run the risk that such evidence will support the government's case. To address that problem, the amendment provides that the trial court is to consider only the evidence submitted at the time of the motion in making its ruling, whenever made. And in reviewing a trial court's ruling, the appellate court would be similarly limited.

Notes of the Advisory Committee on Rules, 1994 Amendment, Fed.R.Crim.P. 29(b). The Advisory Committee clearly perceived the court's inability to reserve ruling as presenting defendants a "damned if you do - damned if you don't" choice to which they should not be subjected.

In the case *sub judice*, under existing law the trial court could not have reserved ruling on defendant's motion for judgment of acquittal. *United States v. Thomas*, 987 F.2d 697, 704 (11th Cir.1993). The amendment of Rule 29(b) necessarily alters the rule in this Circuit prohibiting district courts from reserving ruling on motions for judgment of acquittal made at the close of the government's case-in chief, which rule circumscribed the trial judge here.

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The amended rule however refers in terms only to situations where the court does in fact defer ruling on a Rule 29 motion; such of course was not possible in this case, not will courts hereafter necessarily have to reserve ruling, although prudent courts, mindful of defendant's rights, undoubtedly will do so.

But to apply one rule to a defendant where the court has reserved ruling and another to a defendant where the court has erroneously overruled a Rule 29 motion is incongruous. The basic problem being the same, justice requires a like solution.

I believe that manifest justice requires that amended Rule 29 be applied at the appellate stage in this pending criminal appeal. If that were done, then, under the majority's own analysis, Mullis's conviction would have to be reversed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN

DISTRICT OF GEORGIA STATESBORO DIVISION

UNITED STATES OF AMERICA
Plaintiff,

vs.

PAUL W. CALHOUN, JR. ET AL.
Defendants

FILE NO. CR 692-010

Before: Honorable DUDLEY H. BOWEN, JR.,

District Judge and Jury

at The Federal Courthouse Building, Augusta, Georgia, on the 16th day of

November 1992, commencing at the hour of 9:00 a.m.

RICHARD A. DUERINGER,

CERTIFIED COURT REPORTER

P.O. BOX 2106

AUGUSTA, GEORGIA 30903

(706) 790-6212

THE COURT: Mr. Moore

MR. MOORE: May it please the court I would also move for a judgment of acquittal on behalf of Mr. Mullis on the money laundering count. As the basis for that, Your Honor, I cite the court to U.S. Versus Awan, which is 966 Fed 2nd 1415,|which[786] is a 1992 Eleventh Circuit case. In that case the court held there was no express agreement between the defendant and the co-defendants to launder illegal proceeds and no evidence which indicated that the defendant knew that the funds involved in the transaction represented the proceeds of any unlawful activity.

The basis for the Government's money laundering count against Mr. Mullis is in regard to the formation of the Phoenix Timber Company. That at some point in time there had been an agreement between Mr. Mullis and Mr. Mullis' father and Mr. Collins that a corporation called the Phoenix Timber Company would be formed. The testimony and the evidence is that as far as Mr. Mullis knew and Terry Sowell knew, who was also a party to that agreement, the Phoenix Timber Company had been adandon and it had never came about.

In fact, even Mr. Collins testified that they had abandon going into the timber business. The evidence is that at some later time Mr. Calhoun formed this corporation, but there is no evidence that Mr. Mullis ever participated in the forming of the corporation or was ever an officer, director or shareholder.|[787]

There is also no evidence at the closing that took place, where the title to the 292 Club was placed in the name of the Phoenix Timber Company, that Mr. Mullis participated in that transaction. The closest evidence to that, in my view, is Gene Collins said at some point in time that he gave Mr. Mullis $2, 000 in cash and told Mr. Mullis to go get a cashier's check and take it to Mr. Calhoun. However, the facts and the evidence show that Mr. Mullis never did anything like that. The two cashier's checks were purchased by others and then $1,000 in cash was given for that transaction.

Even Mr. Collins testified that he, Mr. Collins, had at least two legitimate sources of income. He had a legitimate source of income from his farming operation and he had a legitimate source of income form the management of 292 Club. He testified that it netted him a profit and he estimated that at about $500 week and there was nothing illegal about those operations.

Even if you stretch it as far as you can stretch it and accept the uncorroborated and, in fact, the contradicted evidence that Mr. Mullis participated in any transaction involving the 292 Club, there is no evidence, even if he did it and he|did[788] it at that time, that he knew that the funds that were to be used were any illegal funds.

Our view of the evidence is that there is simply no evidence that the

jury could find, beyond a resonable doubt, that a rational jury could find beyond a resonable doubt that Mr. Mullis participated in the title of the 292 Club having been transferred into the Phoenix Timber Company or that he even knew it had been placed in the name of the Phoenix Timber Company.

As to the other counts in the indictment against Mr. Mullis, first the use of a firearm during and in relation to a drug trafficking offense. It is our view of the evidence, Your Honor, that no rational jury could find, beyond a reasonable doubt, that Mr. Mullis used a firearm "during and in relation" to the charged drug trafficking offense in this case.

THE COURT: Just make your motion on that one.

MR. MOORE: All right, sir. The position in the law in the Eleventh Circuit is that mere presence of a firearm —

THE COURT: I don't need that. Just say that you move for a judgment as a matter of law on that count.

789 MR. MOORE: Thank you, Your Honor.

THE COURT: All right.

THE COURT: All right. Thank you.

794 Counsel, my initial reaction to each of the motions is that the evidence does amount to a legal sufficiency to give the cases separately to the jury. I have some concerns about two of the motions which I will continue to keep under consideration and I think that's the best way and the most time economical way that I can approach those is to hear what I expect will be excellent arguments on the evidence from counsel for all the parties.

So, I will provisionally deny the motions and I will permit some revisitation of those upon my invitation after the jury takes the case.

1060 MR. SOLOMON: I didn't want to slow down the machinery in the morning, but I want to renew my motion for a verdict of acquittal before we get out of here tonight.

THE COURT: I will consider all of the motions as having been renewed and they are all denied.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 93-8181

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JULY 11, 1995
MIGUEL J. CORTEZ
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appelant,

versus

FLOYD BROWN, JAMES WOODROW MULLIS,
PAUL WENDELL CALHOUN, JR.,

Defendant-Appellants.

On Appeal from the United States District Court for the
Southern District of Georgia

ON PETITION (S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON and CARNES, Circuit Judges, and MOYE*, Senior District Judge.

PER CURIAM:
(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been

polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

"S/J. B. Edmondson"
UNITED STATES CIRCUIT JUDGE

ORD-42

*Honorable Charles A. Moye, Jr., Senior U.S. District Judge for the Northern District of Georgia, sitting by designation. (9/91)

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names of Parties

July 11, 1995

MEMORANDUM TO COUNSEL OR PARTIES:
RE: 93-8181 USA v. Brown
DC DKT NO.: 92-00010 CR-6

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of madate

Sincerely,
"S/MIGUEL J.CORTEZ, CLERK"
Reply To: Pam Holloway (404) 331-3836

Encl.

REHG-1 (7/87)

(2)

Supreme Court, U.S.
FILED
JAN 4 1996
CLERK

No. 95-693

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES WOODROW MULLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
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24 pp

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for money laundering.

2. Whether the court of appeals erred in not applying an amendment to Federal Rule of Criminal Procedure 29(b) retroactively.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-693

JAMES WOODROW MULLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 53 F.3d 312.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1995. A petition for rehearing was denied on July 11, 1995. Pet. App. C1-C3. The petition for a writ of certiorari was filed on October 10, 1995 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Georgia, petition-

er was convicted of conspiring to distribute marijuana and cocaine, in violation of 21 U.S.C. 846 (Count 1), and of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) (Count 3). The district court sentenced him to 124 months' imprisonment, to be followed by a five-year period of supervised release. Gov't C.A. Br. 2-3.[1] The court of appeals affirmed. Pet. App. A1-A9.

1. The evidence at trial established that petitioner and co-defendant Floyd Brown were members of an organization headed by Gene Collins that transported marijuana from Texas to Georgia, where the marijuana was distributed. The evidence also showed that Collins—assisted by petitioner, Brown, and co-defendant Paul Wendell Calhoun—laundered the proceeds of the marijuana sales by using those proceeds to purchase a Vidalia, Georgia, nightclub known as the "292 Club," in the name of a nominee corporation, the Phoenix Timber Company. The government's evidence included the testimony of Collins and

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[1] A co-defendant, Floyd Brown, who has also petitioned for a writ of certiorari (see *Brown* v. *United States*, petition for cert. pending, No. 95-6419), was convicted of the same offenses and sentenced to a term of 121 months' imprisonment, to be followed by a five-year period of supervised release. Another co-defendant, Paul Wendell Calhoun, was convicted of the money laundering offense and sentenced to a term of 36 months' imprisonment, to be followed by a five-year period of supervised release. The jury acquitted Calhoun of conspiring to distribute marijuana (21 U.S.C. 846) (Count 1), and acquitted petitioner and Brown of using a firearm during and in relation to a drug trafficking crime (18 U.S.C. 924(c)(1)) (Count 4). Co-defendants Darrell Robitzsch and Murphy Stokes were found not guilty of drug conspiracy charges (21 U.S.C. 846) (Count 1) and of using a telephone to facilitate a drug trafficking crime (21 U.S.C. 843) (Count 6). Gov't C.A. Br. 2 & n.1.

other members of his organization, who testified pursuant to plea agreements with the government, and documentary and other evidence corroborating that testimony. See Gov't C.A. Br. 3-15.

Collins' organization began to obtain marijuana from Texas in December 1990, approximately one year after Collins had been released from prison, where he had served a sentence for conspiring to distribute marijuana. Following his release from prison, Collins and Brown rented a 60-acre farm in Stillmore, Georgia, under the name "B & C Farms." After the farm proved unsuccessful growing legal produce, Collins turned to Ceyetano Montez-Flores (Tano), whom Collins had met in prison and who had offered to help Collins reenter the marijuana business after his release. In December 1990, through his connection with Tano, Collins began to obtain marijuana from Texas. Collins also entered into an agreement with James Walter ("Buddy") Williams, another marijuana trafficker, under which Williams and others would sell, in Georgia, the marijuana that Collins had transported there from Texas. Gov't C.A. Br. 3-5.

On Christmas Eve, 1990, Collins met petitioner at the 292 Club and offered to hire him to haul marijuana from Texas to Georgia. Petitioner, who was experiencing financial difficulties, accepted that offer and drove for Collins on three marijuana-related car trips to Texas. Petitioner also transported marijuana within Georgia for Collins. Petitioner also helped Collins to obtain his probation officer's permission to travel freely in connection with his marijuana business, by purporting to substantiate Collins' false statement to the officer that Collins' travel would be for a lawful job with petitioner at a logging supply

company. Between December 1990 and March 1991, the Collins organization had eight drivers and four trucks that traveled between Texas and Georgia on marijuana-related business; those drivers included petitioner and Brown. Pet. App. A1-A2; Gov't C.A. Br. 6-9.

In December 1990 and January 1991, Collins and petitioner discussed starting a timber business, to be known as the Phoenix Timber Company (PTC), and to be incorporated under the names of other persons. The project, however, was delayed by persistent rainy weather; by the time PTC was actually incorporated on January 29, 1991, under the name of petitioner's girlfriend, Collins and petitioner had abandoned their plan of entering the timber business. Instead, Calhoun, Collins' attorney, had recommended to Collins that Collins incorporate PTC and that he use the new corporate entity to purchase the 292 Club with proceeds of narcotics sales, because the authorities would be unable to trace that purchase to Collins. Gov't C.A. Br. 9-10.

Collins thereafter arranged to purchase the 292 Club from its owner, Dan McSwain, for $53,000. In January 1991, Collins gave McSwain $5,000 in cash proceeds of marijuana sales as a down payment for the club. McSwain, however, advised Collins that he could not keep the entire $5,000 in cash and would require an alternative form of payment. Collins thereupon instructed petitioner and Brown each to go to a separate bank and to obtain a $2,000 cashier's check that showed Calhoun (not Collins) as the remitter. As Collins testified at trial, petitioner knew that the $4,000 that Collins provided to him and Brown for the cashier's checks represented marijuana proceeds. A cashier's check and a bank money

order, both for $2,000 and both payable to McSwain, were in fact obtained with cash at local banks around January 22, 1991. Both instruments showed Calhoun as remitter. Pet. App. A2; Gov't C.A. Br. 10-11.

When Collins returned from Texas, he asked petitioner and Brown whether they had obtained the cashier's checks. Petitioner and Brown assured Collins that they had done so, and that, pursuant to petitioner's intructions, they had taken the checks to Calhoun's secretary. McSwain thereupon met with Collins at Calhoun's office, and exchanged the $5,000 in cash that Collins had given him for the cashier's check, the bank money order, and $1,000 in cash. Collins later used an additional approximately $50,000 in marijuana proceeds to complete the purchase of the club by PTC. Gov't C.A. Br. 11-13.

In late January 1991, Tano called Collins from Texas, stated that he had 800 pounds of marijuana, and asked Collins to come pick up that marijuana in a truck, and to bring $200,000 in cash with him. At Collins's direction, Williams and others brought trash bags containing $200,000 to the 292 Club. Williams, petitioner, and several other members of Collins' organization counted the $200,000 while Brown served as lookout. Petitioner was wearing a pistol in a shoulder holster; Collins described him as "my bodyguard." Shortly thereafter, in early February 1991, Collins' organization began to unravel when four of his drivers were arrested in Austin, Texas. Gov't C.A. Br. 13-15.

2. At the close of the government's case, petitioner moved under Federal Rule of Criminal Procedure 29(a) for a judgment of acquittal on the money laundering count. Pet. App. B2-B3. The district court stated that, although it had "some concerns" over

the Rule 29 motions filed by petitioner and his co-defendants, it would "provisionally" deny those motions. *Id.* at B3. Petitioner thereafter testified in his own defense. He denied knowing that Collins was in the drug business and participating in that business or the laundering of its proceeds. See *id.* at A2-A3; Gov't C.A. Br. 15-16. At the close of the defense cases, the court advised petitioner and his co-defendants that it would consider their motions for judgments of acquittal as having been renewed. The court thereupon denied those motions. Pet. App. B3.

3. A divided panel of the court of appeals held that the evidence was sufficient to support petitioner's money laundering conviction. Pet. App. A1-A9.[2] The court held that the government's evidence alone "was possibly enough to prove guilt beyond a reasonable doubt," because that evidence had shown that petitioner "knew that Collins' money came from the marijuana business," and because "the fact, among other things, that [petitioner] showed Calhoun as the remitter of the check might properly allow a jury to infer that [petitioner] knew the purchase of the 292 Club was intended to hide Collins' drug proceeds." *Id.* at A2. The court stated, however, that it was unnecessary "to decide finally whether the government's evidence alone was enough to prove guilt." *Ibid.* The court explained that when a defendant whose motion for a judgment of acquittal at the close of the government's case is denied takes the stand in his own

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[2] The court of appeals unanimously and summarily affirmed the drug conspiracy convictions of petitioner and Brown, and the money laundering convictions of Brown and Calhoun. See Pet. App. A1 n.1; *id.* at A4 (Moye, D.J., concurring and dissenting).

defense, he risks bolstering the government's case. Moreover, the court stated, "a statement by a defendant, if disbelieved by the jury, may be considered as *substantive evidence* of the defendant's guilt," because the jury may "conclude [that] the opposite of his testimony is true." *Id.* at A3.

In this case, the court of appeals noted, petitioner had testified "that he did not know that Gene Collins was in the drug business" and "that he was in no way involved in helping Collins buy the 292 Club." Pet. App. A3. And, the court stated, the jury, "hearing [petitioner's] words and seeing his *demeanor*, was entitled to disbelieve [his] testimony and, in fact, to believe the opposite of what [he] said." *Ibid.* The court explained (*ibid.*) (citations omitted):

> At least where some corroborative evidence of guilt exists for the charged offense (as is true in this case where, for example, there was evidence that [petitioner] helped convert cash to a cashier's check to advance the purchase of the 292 Club) and the defendant takes the stand in his own defense, the defendant's testimony, denying guilt, may establish, by itself, elements of the offense. This rule applies with special force where the elements to be proved for a conviction include highly subjective elements: for example, the defendant's intent or knowledge, such as knowing the purchase of the 292 Club was intended to hide Collins' drug proceeds. Experience tells us that, where the issues in litigation involve highly subjective matters, the appearance and demeanor of the witnesses is of particular significance.

The court of appeals also rejected the dissenting judge's argument that a recent amendment to Federal

Rule of Criminal Procedure 29(b) allowed petitioner to challenge the sufficiency of the evidence presented solely in the government's case-in-chief. That amendment provides that, when a district court "reserves decision [on a motion for judgment of acquittal], it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b) (effective Dec. 1, 1994). The court of appeals noted that petitioner's case had been tried before the December 1, 1994, effective date of the amendment, and that retroactive application of the amended rule was "neither just nor practical." Pet. App. A2 n.3. Moreover, the court noted, circuit precedent before the effective date of the amended rule provided that a defendant who presents evidence waives the right to appeal the denial of a Rule 29(a) motion made and denied at the close of the government's case, and may instead challenge only the sufficiency of "all evidence presented in the case, including evidence put on by the defendant." *Ibid.* (citing *United States* v. *Thomas*, 8 F.3d 1552, 1558 n.12 (11th Cir. 1993)).

Senior District Judge Moye dissented. Pet. App. A4-A9. He argued (*id.* at A4) that the evidence in the government's case-in-chief was insufficient to support petitioner's money laundering conviction. He further argued that the majority had erred in holding that petitioner's disbelieved testimony could be treated on appeal as substantive evidence of his guilt. That approach would render insufficiency claims "unreviewable" in any case in which a defendant testified on his own behalf, Judge Moye argued, because an appellate court is inherently incapable of evaluating such demeanor evidence. *Id.* at A4-A5. Judge Moye also argued (*id.* at A8-A9) that the court of appeals should have applied to petitioner's case the version of

Rule 29(b) effective December 1, 1994. Applying that Rule would require reversal of petitioner's conviction, in Judge Moye's view, because the government's evidence standing alone had not been sufficient to establish petitioner's guilt on the money laundering count. *Id.* at A8.

ARGUMENT

1. Petitioner argues (Pet. 4-7) that the court of appeals erred in holding that a defendant's testimony denying guilt may, in certain circumstances, be considered by a reviewing court in determining whether the evidence of guilt was sufficient. While there is some disagreement among the courts of appeals as to the circumstances under which such testimony may be taken into account in determining sufficiency, the court of appeals' decision in this case was correct under any approach to that question. This case therefore does not present a suitable vehicle for resolving that conflict. Moreover, a recent amendment to Federal Rule of Criminal Procedure 29(b) has largely obviated that question, by enabling defendants in many cases to preserve the right to claim on appeal that the evidence presented by the government, standing alone, was insufficient.

a. To support a conviction for violating the money laundering statute, 18 U.S.C. 1956(a)(1)(B)(i), the evidence must establish that the defendant engaged in a financial transaction involving the proceeds of unlawful activity, that the defendant knew that the property represented the proceeds of a specified unlawful activity, and that the defendant knew that the transaction was designed, in whole or in part, "to conceal or disguise the nature, the location, the source, the ownership, or the control of the

proceeds of specified unlawful activity." 18 U.S.C. 1956(a)(1)(B)(i); see *United States* v. *Brown*, 31 F.3d 484, 488 n.2 (7th Cir. 1994); *United States* v. *Flynt*, 15 F.3d 1002, 1007 (11th Cir. 1994); *United States* v. *Garcia-Emanuel*, 14 F.3d 1469, 1473 (10th Cir. 1994). The concealment element of the statute is met when a transaction is designed "to conceal or disguise *in any manner*" the relevant features of the proceeds of unlawful activity. *United States* v. *Lovett*, 964 F.2d 1029, 1034 n.3 (10th Cir.), cert. denied, 113 S. Ct. 169 (1992).

Although the panel majority based its holding that the evidence was sufficient on all the evidence at trial, the panel's explanation of why the evidence introduced in the government's case-in-chief was, by itself, "possibly enough" to support petitioner's money laundering conviction demonstrated the sufficiency of that evidence. That evidence showed that petitioner had assisted Collins to conceal the proceeds obtained from the distribution of marijuana, by helping Collins to use that money to purchase the 292 Club. In particular, petitioner, having been given $2,000 in proceeds of marijuana sales by Collins, used those funds to buy a $2,000 cashier's check or money order—not under Collins' name, but under the name of a third party, defendant Calhoun. That instrument (and the $2,000 cashier's check or money order similarly obtained by Brown) were then used to help finance Collins' purchase of the 292 Club.

As the panel majority recognized, the jury could infer from the fact that petitioner had "showed Calhoun as the remitter of the check" that petitioner "knew the purchase of the 292 Club was intended to hide Collins' drug proceeds." Pet. App. A2. That inference was supported by the direct testimony of Collins that petitioner was aware that the $2,000 that

he was told to convert into a cashier's check were the proceeds of marijuana sales. It was also supported by petitioner's awareness—as a member of Collins' organization—that Collins was in the business of transporting and distributing marijuana. The inference that petitioner knowingly assisted Collins to hide his drug proceeds was also supported by the fact that petitioner had knowingly assisted Collins to conceal the unlawful nature of his activities on another occasion: when petitioner helped Collins to obtain the permission of his parole officer to travel by falsely stating that Collins would be traveling in connection with legitimate business. See Gov't C.A. Br. 8-11; Gov't C.A. Supp. Br. 9-11; see also *United States* v. *Jackson*, 983 F.2d 757, 766 (7th Cir. 1993) (circumstantial evidence alone is sufficient to support a money laundering conviction); *United States* v. *Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990) (same); cf. *United States* v. *Isabel*, 945 F.2d 1193, 1203-1204 (1st Cir. 1991). Thus, taking into account solely the evidence offered in the government's case-in-chief, the evidence was sufficient to support petitioner's money laundering conviction.

b. The court of appeals held (Pet. App. A2-A3) that it was not necessary to reach the issue whether the evidence offered during the government's case-in-chief was alone sufficient because the jury was entitled to disbelieve petitioner's testimony denying any knowledge of or participation in illegal activity, "and, in fact, to believe the opposite of what [petitioner] said." It is well established that, in addition to considering affirmative evidence of guilt, a jury may draw negative inferences from a defendant's testimony and consider those inferences in reaching a verdict. See *United States* v. *Friedman*, 998 F.2d 53,

57 (2d Cir. 1993) (jury entitled to draw negative inferences from defendant's testimony at trial); *United States* v. *Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991) (where defendant takes the stand "and denies the charges and the jury thinks he's a liar, this becomes evidence of guilt to add to the other evidence"), aff'd, 506 U.S. 534 (1993); *United States* v. *Bauer*, 19 F.3d 409, 412 n.2 (8th Cir. 1994) (same); *United States* v. *Kenny*, 645 F.2d 1323, 1346 (9th Cir.) ("When the defendant elects to testify, he runs the risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth."), cert. denied, 452 U.S. 920 & 454 U.S. 828 (1981); *United States* v. *Allison*, 908 F.2d 1531, 1535 (11th Cir. 1990) (jury may reject defendant's explanation "as a complete fabrication" and view "[the] defendant's false explanatory statement as substantive evidence proving guilt"), cert. denied, 500 U.S. 904 (1991). A plurality of this Court recently concluded that, when a jury disbelieves a testifying defendant, it is "further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt." *Wright* v. *West*, 505 U.S. 277, 296 (1992) (opinion of Thomas, J.).[3]

The question whether a jury may treat a defendant's false testimony as affirmative evidence of guilt is, however, distinct from the question of when an appellate court may consider that false testimony in

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[3] Chief Justice Rehnquist and Justice Scalia joined Justice Thomas's plurality opinion. 505 U.S. at 278. None of the six Justices who concurred in the judgment disagreed with Justice Thomas's statement that a defendant's testimony could be considered as affirmative evidence of guilt. See *id.* at 297-316. In his opinion concurring in the judgment, Justice Souter stated that a similar state evidentiary rule "has the virtue of much common sense." *Id.* at 315.

evaluating whether the evidence against him was sufficient. On that question, the courts of appeals have reached different conclusions. In *Zafiro*, *supra*, the Seventh Circuit stated in dicta that the false testimony of a defendant in denying the charges against her "becomes evidence of guilt to add to the other evidence" considered in the inquiry into sufficiency. See 945 F.2d at 888. The court acknowledged that the District of Columbia Circuit had expressed concern that "if negative inferences, based on demeanor evidence, were adequate in themselves to satisfy a rational juror of guilt beyond a reasonable doubt, appellate courts might not be able to provide meaningful review of the sufficiency of evidence." *Ibid.* (quoting *United States* v. *Jenkins*, 928 F.2d 1175, 1179 (D.C. Cir. 1991)). The Seventh Circuit discounted that concern, however, on the ground that such cases were unlikely to occur because, when there is no evidence of guilt other than an adverse inference from a defendant's disbelieved claim of innocence, the defendant would be entitled to a judgment of acquittal at the close of the government's case and would have no need to testify at all. 945 F.2d at 888. Cf. *Kenny*, 645 F.2d at 1346.

As petitioner notes (Pet. 6), the District of Columbia Circuit has taken a different approach. It has held that, although the substance of a defendant's testimony may be considered in determining the sufficiency of the evidence, it is generally improper for an appellate court to assume that the jury may have drawn negative inferences from a testifying defendant's demeanor. *United States* v. *Zeigler*, 994 F.2d 845, 848-850 (D.C. Cir. 1993); see *United States* v. *Thorne*, 997 F.2d 1504, 1511 (D.C. Cir.) (same), cert. denied, 114 S. Ct. 568 (1993); *Jenkins*, 928 F.2d at 1178-

1179; see also *United States* v. *Sliker*, 751 F.2d 477, 495 n.11 (2d Cir. 1984) (reaching same result), cert. denied, 470 U.S. 1058 & 471 U.S. 1137 (1985). The District of Columbia Circuit has reasoned that, if negative inferences based upon the defendant's demeanor while testifying were to be considered in the sufficiency inquiry, it would undermine the protection that appellate review of the sufficiency of the evidence provides against wrongful convictions. *Zeigler*, 994 F.2d at 850. The court explained (*id.* at 849):

> Because we cannot evaluate demeanor, [consideration of demeanor in evaluating sufficiency claims] would mean that in cases in which defendants testify, the evidence invariably would be sufficient to sustain the conviction. We would in each case assume the jury correctly evaluated the evidence. In explaining how this could be so in light of the defects in the government's proof, we would reason backwards to the only explanation available—the defendant's demeanor. This sort of approach, beginning with the hypothesis that the jury must have gotten things right, contradicts the reason why appellate courts review convictions for sufficiency of evidence—that juries sometimes get things wrong.

The District of Columbia Circuit has recognized, however, that it is appropriate for an appellate court to consider a defendant's denials of guilt when that "testimony, on its face, [is] utterly inconsistent, incoherent, contradictory or implausible." *Ibid.* In such instances, the court has explained, "an appellate court would have some assurance that when the

defendant said 'black' the jury reasonably could have concluded that the truth was 'white.'" *Ibid.*[4]

While the conflicting approaches articulated by the Seventh Circuit and the District of Columbia Circuit may at some later point warrant resolution by this Court, the present case is not a suitable vehicle for resolving that conflict. First, as we have explained, the evidence presented in the government's case-in-chief was itself sufficient to support petitioner's conviction, for the reasons suggested by the panel majority. Resolution of the issue whether the demeanor of a testifying defendant may be considered by a reviewing court upon a sufficiency challenge would therefore have no impact upon the resolution of this case.

Second, even if the evidence presented in the government's case-in-chief were not itself sufficient, it appears that, even under the approach taken by the District of Columbia Circuit, an appellate court would be entitled to conclude that the jury drew negative inferences from petitioner's denials of guilt. That circuit has held that an appellate court may treat a defendant's denial of guilt as substantive evidence against him when the "defendant's testimony, on its face, [is] utterly inconsistent, incoherent, contradictory or implausible." *Zeigler*, 994 F.2d at 849. That exception applies in this case. As the court of appeals noted, petitioner "testified under oath that he did not know that Gene Collins was in the drug

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[4] The First and Tenth Circuits have recently noted the disagreement between *Ziegler* and *Zafiro*, but have not found it necessary to decide which view is correct. See *Walker* v. *Waltham Housing Authority*, 44 F.3d 1042, 1049-1050 (1st Cir. 1995); *Stallings* v. *Tansy*, 28 F.3d 1018, 1024 (10th Cir. 1994).

business. He also testified that he was in no way involved in helping Collins buy the 292 Club." Pet. App. A3. Given that the jury found petitioner guilty of distributing marijuana and cocaine as a member of Collins' organization (Count 1), and given the direct and circumstantial evidence pointing to petitioner as a purchaser of one of the two cashier's checks used in the second downpayment for the 292 Club, see Gov't C.A. Supp. Br. 9-12, it is reasonable to conclude that the jury found petitioner's wholesale denials of any knowledge of or involvement in any of Collins' illegal ventures to be wholly incredible. Because petitioner's denials were "utterly inconsistent, incoherent, contradictory or implausible" in light of his conviction on the distribution count and the other evidence in the case, the court of appeals had a reasonable "assurance that when [petitioner] said 'black' the jury reasonably could have concluded that the truth was 'white.'" *Ziegler*, 994 F.2d at 849. Thus, the court was correct to conclude that "the jury, hearing [petitioner's] words and seeing his demeanor, was entitled to disbelieve [his] testimony and, in fact, to believe the opposite of what [he] said." Pet. App. A3 (emphasis omitted).

Finally, in light of the recent amendment to Federal Rule of Criminal Procedure 29(b), it is unlikely that the issue of when a reviewing court may consider a defendant's testimony denying involvement in an offense as evidence of guilt will occur with any frequency. Before that amendment took effect, a defendant who elected to present evidence in a case in which the district court reserved ruling on a motion for a judgment of acquittal at the close of the government's case-in-chief would "run the risk that such evidence will support the government's case."

Fed. R. Crim. P. 29 advisory committee's note (1994 amendment). The recent amendment to Rule 29(b) has relieved the defendant of that risk, by providing that, when a district court has reserved ruling on a motion for a judgment of acquittal, "it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b). The advisory committee note to the amended Rule further states that appellate review of such a ruling will be "similarly limited" to the evidence that had been presented at the time the ruling was reserved. Fed. R. Crim. P. 29 advisory committee's note (1994 amendment).

As a result, in future cases in which a defendant moves for a judgment of acquittal at the close of the government's case-in-chief and in which the sufficiency of evidence presented at that point presents a close question, the district court may simply reserve ruling on such a motion at the close of the government's case-in-chief. Because such action will preserve for appellate review the issue whether the government's evidence alone was sufficient, the issue whether the defendant's denials of guilt could be taken into account in a sufficiency inquiry will not arise. It is true, of course, that that issue may still arise where a district court denies a motion for judgment of acquittal made at the close of the government's case, and where the sufficiency of the government's evidence standing alone presents a close question on appeal. Under Rule 29(b) as amended, however, the defendant would have the opportunity in such cases to ask the district judge to reserve ruling on that motion so as to preserve his right on appeal to challenge the sufficiency of the government's evidence alone, and, where the government's evidence is

not clearly sufficient by itself, it is reasonable to expect that such requests will often be granted. Thus, the issue raised by the petition appears to be of diminishing importance and does not merit review at this time.

2. Petitioner also claims (Pet. 7-10) that the court of appeals erred in not retroactively applying to his case the amendment to Federal Rule of Criminal Procedure 29(b) that took effect December 1, 1994. The court of appeals, however, was correct in not applying that amendment. First, as the court of appeals noted (Pet. App. A2 n.3), the amendment did not take effect until after petitioner's trial had been completed, and, indeed, not until after his appeal had been briefed and argued in the court of appeals. The Rule does not provide for retroactive application. The court of appeals was therefore correct to hold (*ibid.*) that it was "neither just nor practical" to apply that amendment retroactively. Cf. *Norris* v. *United States*, 190 F.2d 186, 188 (5th Cir. 1951) (Federal Rules of Criminal Procedure are not retroactive); 3A Charles Alan Wright, *Federal Practice and Procedure* § 922, at 378 (2d ed. 1982) (rules and amendments not retroactive).[5]

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[5] Petitioner's reliance (Pet. 8) on *Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974), and *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), in support of his claim for retroactive application of the amendment to Rule 29(b) is misplaced. The Court stated in *Bradley* that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. The order that transmitted the 1994 amendments to the Federal Rules of Criminal Procedure provided such direction, by specifying that the amendments were to be applied in pending cases only "insofar as just and practicable." Supreme Court Order, Apr. 29, 1994 (Rehnquist, C.J.); see also Pet. App. A3 n.3 (applying

And it is undisputed that, before the amendment to Rule 29(b), a defendant who put on evidence following the denial of a motion for a judgment of acquittal at the close of the government's case-in-chief would "run the risk that such evidence will support the government's case." Fed. R. Crim. P. 29 advisory committee's note (1994 amendment). Second, even if the amended Rule applied, the district court did not clearly "reserve" decision on petitioner's motion for judgment of acquittal within the meaning of that Rule. Instead, the district court stated (Pet. App. B3) at the time that it was "provisionally" denying the defendants' motions for judgments of acquittal; at the close of the defense cases, the court stated (*ibid.*) that it would treat those motions as having been renewed, and that it was denying them.

In any event, the decision below that the amendment to Rule 29(b) does not apply to this case is not in conflict with any other reported decision. Nor does it present a question of general importance warranting this Court's review.

"just and practicable standard"). As for the Court's statement in *Griffith* that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final," 479 U.S. at 328, the Court was discussing new *constitutional* rules, not Federal Rules of Procedure. See *id.* at 320-328 (reviewing Court's post-1965 analyses for "claims of retroactivity of new constitutional rules of criminal procedure").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1996